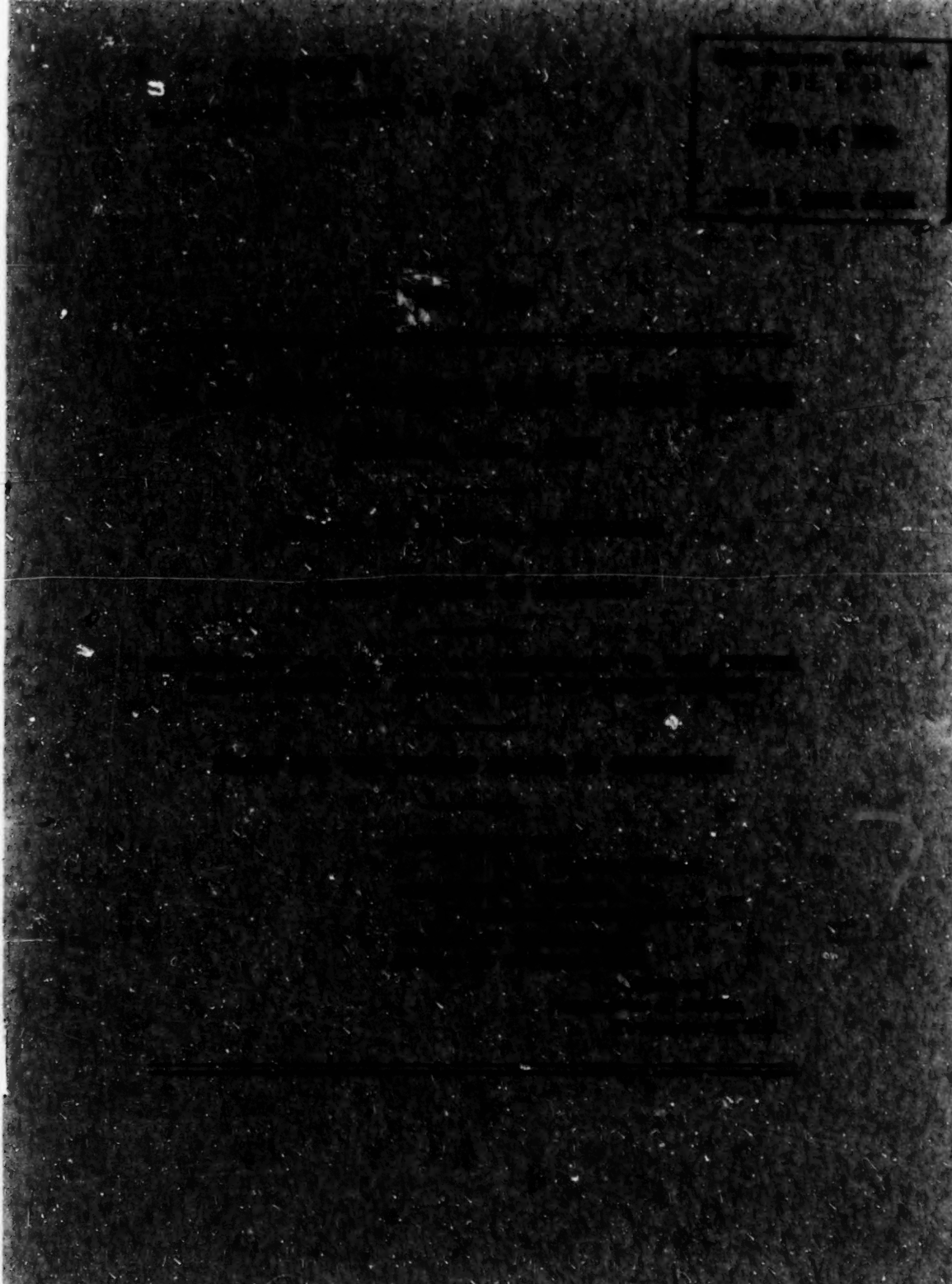

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675213—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 759

FRANK E. MAESTAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 3–17; Pet. App. 11–21) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1962 (Vol. II, 3, 18; Pet. App. 11, 22). A petition for rehearing was denied on December 21, 1962 (Vol. II, 23; Pet. App. 22–23). The petition for a writ of certiorari was filed on January

[1] The record consists of two separately paginated volumes. Volume I contains the trial transcript and related proceedings and is referred to as "Tr."

18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence of petitioner's possession of narcotics was sufficient to justify reliance on the presumption erected by 21 U.S.C. 174.

STATUTE INVOLVED

Section 174 of Title 21 U.S.C. provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * * shall be imprisoned not less than five or more than twenty years * * *.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> * * * * *

STATEMENT

After a trial by jury in the United States District Court for the District of Colorado, petitioner and co-defendant Andrew Lucero were convicted of having unlawfully received and sold narcotic drugs with

knowledge that the drugs had been imported into the United States contrary to law, in violation of 21 U.S.C. 174, *supra* (Tr. 1–2, 3, 6–7, 8). Petitioner was sentenced to imprisonment for eight years on each of the two counts,[2] the sentences to run concurrently (Tr. 8). The court of appeals affirmed petitioner's conviction on count one, one judge dissenting, and reversed his conviction on the second count (Vol. II, 3–17, 18; Pet. App. 11–21, 22).

The facts relating to petitioner's conviction on count one may be summarized as follows:

At about 8:00 p.m. on March 22, 1961, Narcotic Agent Chester Wolski and an informer for the Denver Police Department drove up to a service station in Colorado Springs, Colorado, where the informer placed a telephone call. (Tr. 14–15). Shortly thereafter, Wolski and the informer entered a tavern and seated themselves in a booth. Petitioner and Lucero arrived a few minutes later and seated themselves at the same booth (Tr. 15, 33). The informer introduced Wolski to the two men, and a general conversation ensued. Wolski then broached the subject of narcotics with petitioner. When Wolski asked how much a half ounce of heroin would cost, petitioner replied the price would be $250. He said it could be "cut down the middle," indicating the quality of the narcotics was such that it might be diluted to double

[2] The information (an indictment having been waived) charged the petitioner and Lucero each with three sales of narcotics (Tr. 1–2). Lucero was convicted on all counts (Tr. 3, 6–7). The trial judge dismissed count three as to the petitioner, and petitioner was convicted on the remaining counts (Tr. 3–4, 8).

the quantity. Wolski took out the money and asked whether the deal would take place there. Petitioner said "not here" and then talked to Lucero in Spanish. Lucero told the agent to give the money to petitioner but the agent refused to do so until he had the narcotics (Tr. 16, 28). Wolski and Lucero then left the tavern and entered an automobile which was parked nearby. On directions from Lucero, Wolski drove to a certain intersection and stopped. Lucero got out of the automobile, walked over to a gutter and picked up a package which he handed to Wolski in exchange for the money. On subsequent analysis, the package was found to contain heroin (Tr. 17, 51–52).

In its instructions to the jury, the court explained the nature of the charges and read 21 U.S.C. 174 (Tr. 74, 75–76). It charged (Tr. 76, 77):

> Now, of course, before this statutory presumption can become effective, it must be established by the evidence beyond a reasonable doubt that the defendant knowingly and fraudulently had the heroin described in the information in his possession.
>
> * * * * *
>
> As used in this statute and as I have used it in discussing this matter with you, the word "possession" means a physical control with intent to exercise control, with knowledge of the presence and character of the narcotic existing prior to the exercise of such control.
>
> Physical control is not limited to the actual physical handling of the narcotic, but it extends to any situation wherein the defendant had the right and the power to control the narcotic to

> the exclusion of others, wherever it might be situated.
>
> In other words, the term "possession" means actual possession by the accused, not necessarily in his hand, of course, but under the control and dominion. So, if you find beyond a reasonable doubt that the defendant so had possession knowingly and fraudulently of the heroin described in the information or any substantial part of the amount described in each respective count of the information, then, of course, you will be warranted in giving effect to the statutory presumption that I have just read to you, and you may find the defendant guilty as charged in that particular count of the information.

The court charged that one who aids and abets another in the commission of a crime against the United States is a principal to the crime and may be tried and convicted as though he were the actual perpetrator of that offense; and that if the jury found that the crime charged in count one had been committed by some person or persons other than the petitioner, but that the petitioner had aided or abetted its commission, the jury would be warranted in finding the petitioner guilty of that offense (Tr. 78–79). No exception was taken to the court's instructions.

ARGUMENT

Contrary to petitioner's assumption (Pet. 2, 6), this case does *not* present the question whether the presumption erected by 21 U.S.C. 174 applies to a mere associate in the transaction who did not himself possess or control the narcotics. For present purposes, we may assume with the court below (Pet.

14) that the presumption is inapplicable to a co-defendant who has neither actual nor constructive possession. On the other hand, all of the decisions recognize that exclusive physical custody is not required to invoke the statute, but that dominion and control, though shared with others, is sufficient, and that ability to cause the drug to be produced by someone else amounts to constructive possesion. *United States* v. *Jones,* 308 F. 2d 26, 30–31 (C.A. 2); *Hernandez* v. *United States,* 300 F. 2d 114, 117 (C.A. 9); *United States* v. *Hernandez,* 290 F. 2d 86, 90 (C.A. 2); *United States* v. *Santore,* 290 F. 2d 51, 76 (C.A. 2), certiorari denied, 365 U.S. 834; *Rodella* v. *United States,* 286 F. 2d 306 (C.A. 9), certiorari denied, 365 U.S. 889; *Cellino* v. *United States,* 276 F. 2d 941, 945 (C.A. 9); *United States* v. *Malfi,* 264 F. 2d 147, 150 (C.A. 3), certiorari denied, 361 U.S. 817; *United States* v. *Maroy,* 248 F. 2d 663, 666 (C.A. 7). That is the theory of this case. There is accordingly no conflict of principle between the instant decision and *Hernandez* (C.A. 9) or *Jones* (C.A. 2). Nor do the majority and dissenting opinions below disagree as to the applicable rule. Compare Pet. 14–15 and Pet. 17–18. The only question here is whether the evidence *in this case* was sufficient to establish the requisite constructive possession on the part of petitioner.[3]

[3] It is too late in the day to suggest (Pet. 8) that the presumption flowing from possession under Section 174 contravenes the Fifth Amendment. See *e.g.*, *Casey* v. *United States,* 276 U.S. 413, 418; *Yee Hem* v. *United States,* 268 U.S. 178, 182. See also our brief in opposition to the petition for certiorari in *Jennings* v. *United States,* No. 840 Misc., this Term.

The facts already recited support the conclusion that petitioner controlled the narcotics and the actual sale. He set the price, vouched for the quality of the drug, and determined where the transaction would be consummated. There is at least a permissible inference that petitioner's conversation with Lucero in Spanish was an instruction directing the conditions of the transfer, and perhaps revealing the hiding place of the narcotics. In short, petitioner was clearly the dominant party in the transaction, apparently dictating every move. While he did not actually soil his hands, it is plain he had effective possession of the drug.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

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